IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.1157/2003

Ashok Kumar Sharma S/o Shri Tanna Lal
Versus
The State of Rajasthan through P.P.

Date of Judgment :::: 9th February, 2007

PRESENT
Hon'ble Mr. Justice Narendra Kumar Jain

Shri V.R. Bajwa, with
Shri V.P. Bishnoi, Counsel for accused-appellant
Smt. Nirmala Sharma, P.P., for the State
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//Reportable//

By the Court:-

Accused Ashok Kumar Sharma has preferred this appeal under Section 374 (2) of the Code of Criminal Procedure, against the judgment and order dated 25.7.2003, passed by the Special Judge, N.D.P.S. Act Cases, Jaipur, in Sessions Case No.6/2001, whereby he was convicted under Section 8/21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter shall be referred to as 'the Act, 1985') and sentenced to ten years rigorous imprisonment and a fine of Rs.1,00,000/- (Rupees one lac); in default of payment

of fine, to further undergo two years simple imprisonment.

Briefly stated the facts of the case are that PW-1 Mehtab Singh, the Additional Superintendent of Police (Crimes), Jaipur City, Jaipur, received a secret information from one informer at Police Station, Malviya Nagar, Jaipur, where he had gone for official work, which was reduced in writing by him vide Exhibit P-1 on 25th of February, 2001, at about 3.00 P.M., that one Ashok Kumar, resident of 11/1358, Malviya Nagar, Jaipur, will supply smack to some person near Nandpuri under-bridge. The said information was sent by him to his superior officer i.e. D.I.G., Range-I, Jaipur, vide Exhibit P-2. Thereafter he proceeded for the place as informed by the informer. He also called two independent witnesses through Constable, who brought Lal Chand (PW-3) and Rameshwar (PW-4). One Gauri Shankar (PW-7), the goldsmith, was also called for weighing the contraband. At about 4.55 P.M. one scooter came at the place as informed by informer, which was stopped by PW-1 Mehtab Singh, and, on his asking, the scooter-rider stated his name as Ashok Kumar, resident of Sector No.11, Malviya Nagar. PW-1 gave his

identification and informed him that he has an information that accused (suspect) is having smack in his possession. A notice Exhibit P-3 was given under Section 50 of the Act, 1985, to accused (suspect) to get himself searched either before Magistrate or Gazetted Officer or before him, who is also a Gazetted Officer. The accused (suspect) gave his consent in writing on Exhibit P-3 itself that he has full confidence in him and he may search him. Thereafter, a search was made and two packets from right-pocket and two packets from left-pocket of his pants were recovered, which were found to be smack from its colour and smell. The contraband was weighed by Gauri Shankar (PW-7), and the weight of each packets was found thus - 100 grams + 100 grams + 92 grams + 52 grams, and the total weight of all packets was 344 grams. From each packet two samples were taken weighing ten grams and they were sealed. The remaining packets were also sealed separately. The samples were marked as A-1, A-2, B-1, B-2, C-1, C-2, D-1, and D-2, and remaining packets were marked as A, B, C, D. The accused was arrested vide arrest-memo Exhibit P-5. The scooter of the accused was also seized vide Exhibit P-6. A written-report was lodged by the Additional Superintendent of Police Mehtab Singh (PW-1), to the

Station House Officer, Police Station, Malviya Nagar, Jaipur, who registered F.I.R. No.112/2001 (Exhibit P-8) under Section 8/21 of the Act, 1985. The specimen seal produced by PW-1 was seized by the S.H.O., vide Exhibit P-9. The site-plan was prepared. The samples of contraband were sent vide letter dated 26.2.2001 (Exhibit P-14), to the Rajasthan State Forensic Science Laboratory, Jaipur. The report of Public Analyst is Exhibit P-19 and, according to it, the result of analysis was given that on micro-chemical examination, the sample in each of the packets marked A-1, A-2, B-1, B-2, C-1, C-2, D-1, and D-2, gave positive tests for the presence of diacetylmorphine (HEROIN).

After completion of investigation, a challan was filed against the accused. The learned trial court framed charge against the accused under Section 8/21 of the Act, 1985, which was denied and he claimed to be tried.

The prosecution, in support of its case, examined 14 witnesses and produced documentary evidence Exhibit P-1 to Exhibit P-19. Thereafter the statement of the accused was recorded under Section

313, Cr.P.C., wherein he stated that a false case was registered against him.

The learned trial court, after hearing the arguments from both the sides and considering the oral as well as documentary evidence on the record, convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the appellant, Shri V.R. Bajwa, contended that the trial court, in the facts and circumstances of the present case, has committed an illegality in convicting and sentencing the accused-appellant and, therefore, the judgment and order of the trial court is liable to be set aside by this Court. He contended that from the recovery-memo of contraband (Exhibit P-4) it is clear that the contraband was recovered from pants-pocket of the accused, therefore, Section 50 of the Act, 1985, was attracted in the present case. In this connection he referred the decision of the Hon'ble Supreme Court in the case of State of Himachal Pradesh Vs. Pawan Kumar - (2005) 4 SCC 350, wherein their Lordships considered and interpreted the words "Search of person", used in Section 50 of the Act, 1985. Their Lordships held

that search of a bag, briefcase or any such article or container, etc., which is being carried by accused, is not a search of the person, hence Section 50 would not apply in such a case. But the word "person" would mean a human being with appropriate coverings, clothings and footwear.

So far as the present case is concerned, there is no dispute that the contraband was recovered from the pants-pocket of the accused, and clothings of a person have been included in the word "person" used in Section 50, therefore, Section 50 of the Act, 1985, is attracted in the present case. In this background of the matter and presuming that Section 50 of the Act, 1985, is applicable in the present case, the learned counsel for the accused-appellant contended that there is violation of provisions of Section 50 in the present case and for that purpose he referred to the document Exhibit P-3 - the notice given to the accused under Section 50 and Exhibit P-4 - the seizure-memo, and, on that basis he contended that PW-1 Mehtab Singh, who himself was an authorized officer under Section 42 of the Act, gave option to the accused for his search before himself as he was a Gazetted Officer also, and, after obtaining the consent of the accused,

a search of contraband from the person of accused was made in presence of PW-1 Mehtab Singh himself, therefore, PW-1 Mehtab Singh, who was authorized officer under Section 42 of the Act, acted in dual capacity i.e. under Section 42 as well as Section 50 of the Act, 1985, both, and, in view of the law laid down by the Hon'ble Supreme Court in the case of State of Rajasthan Vs. Ram Chandra - (2005) 5 SCC 151, an Officer, who acts in dual capacity, is not treated sufficient compliance of Section 50 of the Act. He referred Para 21 of the above judgment in support of his contention. He further contended that the provisions of Section 50 have been held to be mandatory and, therefore, non-compliance thereof would defeat the entire prosecution case and entire proceedings are liable to be declared as vitiated. He also referred to the following decisions -

1. Babulal and Others Vs. Union of India - 1996 Cri.L.J. 1864
2. Nadeem Vs. State of Rajasthan - 1998 Cr.L.R. (Raj.) 392
3. Anil Vs. Union of India - 2004 (2) Cr.L.R. (Raj.) 1165
4. Shyam Lal Versus State of

Rajasthan - 2005 (1) Cr.L.R. (Raj.) 60

5. Ram Chandra Versus State of Rajasthan - 2003 (1) Cr.L.R. (Raj.) 455

6. Azad Singh & Another Versus The State of Rajasthan - 2000 Cr.L.R. (Raj.) 480

7. Munna Ali Versus State - 1999 (1) EFR 287

The learned counsel for the appellant also contended that necessary link evidence in the present case is missing relating to compliance of Sections 55 and 57 of the Act, 1985. It is contended that the provisions of Sections 55 and 57 may not be mandatory in nature but the Hon'ble Apex Court has held that compliance of the provisions of Sections 55 and 57 is necessary. In this connection, he referred to the decisions in the following cases -

1. Gurbax Singh Versus State of Haryana - JT 2001 (2) SC 330

2. Faglu Ram and Another Versus State of Rajasthan - 2001 (2) R.C.C. 961

3. Prakash Singh Versus State of Rajasthan - 2001 Cr.L.R. (Raj.) 147

4. Gopal Lal Versus Union of India - 2006 (1) Cr.L.R. (Raj.) 532

The learned counsel for the appellant has also contended that it was necessary to be mentioned in the notice given under Section 50 of the Act, 1985, that the accused has a "right" of his search either before a Magistrate or a Gazetted Officer and, if the fact of "right" has not been mentioned then the notice will be treated as invalid and it will be treated violative of mandatory provisions of Section 50. In this connection, he referred to the decisions in the following cases –

1. K. Mohanan Versus State of Kerala – (2000) 10 SCC 222

2. Chandra Kailash Hanuman Versus The State of Rajasthan – 2004 (2) Cr.L.R. (Raj.) 1049

3. Dilip & Another Versus State of M.P. – 2006 (8) Supreme 914

On the basis of above referred judgments, the learned counsel for the appellant further argued that description of the accused was not mentioned in the information (Exhibit P–1) and, in absence thereof, it was not possible for PW–1 Mehtab Singh to identify the accused. The description of vehicle, which was to be used by the accused, was also not mentioned. The prosecution witnesses have not

stated that the informer also accompanied with PW-1 Mehtab Singh for the site. The learned counsel for the appellant further contended that from the recovery-memo of contraband as well as arrest-memo of the accused, it is clear that so-called notice under Section 50 of the Act, 1950, was not recovered from the possession of the accused, therefore, it should be presumed that no notice was given to him and it should be treated as violation of mandatory provisions of Section 50 and the accused should be acquitted. It is further contended that the seal, which was used on the recovery-memo (Exhibit P-4), was not sealed at the spot, nor any memo of specimen seal was prepared. He also referred 'maalkhana' register, wherein no entry was found as to when the samples were taken out and sent for chemical examination. He, therefore, contended that the prosecution has failed to prove the case against the accused beyond all reasonable doubts and he is entitled to be acquitted.

Per contra, the learned Public Prosecutor - Smt. Nirmala Sharma, contended that the submissions of the learned counsel for the accused-appellant are not tenable in the facts and circumstances of the present case as well as in view of the settled position of

law. She supported the impugned judgment of the trial court. It is contended on behalf of the State that description of the accused was given which is clear from the information Exhibit P-1 itself. His name itself was mentioned with his address. She referred the statement of PW-5, who stated that the informer had also gone at the spot with PW-1 Mehtab Singh to identify the accused. It is further stated that a notice under Section 50 of the Act, 1985, was given to the accused and there is no cross-examination from the prosecution witnesses as to whether the same was given, or not, therefore, even if, it is not mentioned in the recovery-memo (Exhibit P-4) or arrest-memo of the accused (Exhibit P-5) about recovery of notice from the possession of the accused, it hardly makes any difference. It is further contended that PW-7 Gauri Shankar is an independent witness in the case, who proved the prosecution case. PW-12 Manish Kumar has stated that PW-7 Gauri Shankar was present at the spot. PW-12 has further stated that the informer was also present to identify the accused at the spot. In support of her arguments, the learned Public Prosecutor referred to the decisions in the following cases:-

1. Balubhai Nathalal Bharada Versus State of Maharashtra – (2004) 13 SCC 628

2. Bhanwar Singh Vs. Union of India – 2006 Cri.L.J. 3585

3. State of Punjab Vs. Swaran Singh – (2005) 6 SCC 101

In State of Himachal Pradesh Vs. Pawan Kumar – (2005) 4 SCC 350, their Lordships of the Hon'ble Supreme Court considered the meaning and scope of word "person" in the context of Section 50 of the Act, 1985, and held that the word "person" has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be "the body of human being as presented to public view usually with its appropriate coverings and clothing". The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Para 10 of the judgment is reproduced as under:-

> "10. We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or

body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad common-sense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be - "the body of a human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of other without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For

> interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a human being with appropriate coverings and clothings and also footwear."

In State of Rajasthan Versus Ram Chandra - (2005) 5 SCC 151, their Lordships of the Hon'ble Supreme Court considered the provisions of Section 50 of the Act, in detail, and, in Para Nos.12, 13, 18, 19 and 21, held as under:-

> "12. It is not disputed that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in the presence of one of the officers named in the section itself. Since no specific mode or manner is prescribed or intended, the court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met is a question which is to be decided on the facts of each case and there cannot be any sweeping generalization and/or straitjacket formula.
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> 13. Section 50 does not involve any self-incrimination. It is only a procedure required to protect the rights of an accused (suspect) being made aware of the existence of his

right to be searched if so required by him before any of the specified officers. The object seems to be to ensure that at a later stage the accused (suspect) does not take a plea that the articles were planted on him or that those were not recovered from him. To put it differently, fair play and transparency in the process of search has been given primacy. In Raghbir Singh Vs. State of Haryana – (1996) 2 SCC 201 the true essence of Section 50 was highlighted in the following manner: (SCC pp.204-05, paras 8-11)

> "8. The very question that is referred to us came to be considered by a Bench of two learned Judges on 22.1.1996 in Manohar Lal v. State of Rajasthan – (1996) 11 SCC 391. One of us (Verma, J.), speaking for the Bench, held: 'It is clear from Section 50 of the NDPS Act that the option given thereby to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available gazetted officer or the nearest available Magistrate. The choice of the nearest gazetted officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused.'
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> 9. We concur with the view taken in Manohar Lal case.
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> 10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequence of requiring him

> to prove that he was not in contravention of its provisions and it renders him liable to severe punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a gazetted officer or a Magistrate, depending upon who is conveniently available.
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> 11. The option under Section 50 of the Act, as it plainly reads, is only of being searched in the presence of such senior officer. There is no further option of being searched in the presence of either a gazetted officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in Section 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, gazetted officer or Magistrate."

18. If the person so requires, the officer referred to under sub-section (1) of Section 50 may detain the person to bring him before the gazetted officer or the Magistrate, as the case may be. As was noticed in Raghbir Singh case the Act affords the person to be searched a safeguard to the effect that he may require the search to be

conducted in the presence of a senior officer. The senior officer may be a gazetted officer or a Magistrate depending upon who is conveniently available. That being the purpose of the Act, if any gazetted officer even if he is a police officer of a particular rank is present nearby when the accused is detained, the accused may be asked as to whether he would like to be searched in the presence of that officer or a Magistrate. The foundation of the stand taken by the accused-respondent which found favour with the High Court is that if he is a member of the raiding party the requirements of Section 50 are not met. This is not legally tenable, and in any event on the facts of the present case it was not so because PW 3, the Deputy Superintendent of Police reached the spot after the person was detained.

19. As noted above, in Raghbir Singh case the option given to the accused is only to choose whether he would like to be searched by the officer making the search or in the presence of the nearest available gazetted officer or the nearest available Magistrate. The choice of the nearest gazetted officer or the nearest Magistrate has to be exercised by the officer making the search and not by the accused. In the instant case all the options were made known to the accused and he himself opted to be searched in the presence of the Deputy Superintendent of Police (PW 3).

21. The conclusions of the High Court would have been correct if the officer proposing to effect the search is a gazetted officer and he gives option to be given under Section 50 to the person detained to be searched in his presence. In that event, the requirement of Section 50 would not be met because the officer proposing to

> effect the search cannot act in dual capacity; first as an officer authorized under Section 42 to search a person and second as the gazetted officer in whose presence the accused may opt to be searched."

In Babulal Vs. Union of India - 1996 Cri.L.J. 1864, a Single Bench of the Madhya Pradesh High Court held that taking a Gazetted Officer along with the raiding party makes such person impliedly interested in raid, hence it is not sufficient compliance of the mandatory provisions of Section 50.

In Nadeem Vs. State of Rajasthan - 1998 Cr.L.R. (Raj.) 392, a Single Bench of this Court held that when a Gazetted Officer is with the raiding party then his evidence becomes doubtful. The provision does not require to carry the officer to the accused for witnessing the search.

In Anil Versus Union of India - 2004 (2) Cr.L.R. (Raj.) 1165, this Court held that the accused-persons were not informed about their right that a Magistrate or Gazetted Officer, if sees no reasonable ground for search, shall discharge the appellants and on that ground the conviction of the accused was set aside.

In Shyam Lal Vs. State of Rajasthan - 2005 (1) Cr.L.R. (Raj.) 60, a Single Bench of this Court held that S.H.O. did not inform appellant about his right to be searched either before a Magistrate or Gazetted Officer, and he himself effected search and seizure and thus played role of a Magistrate or Gazetted Officer, and in these circumstances it was held that the appellant was not made fully aware of his right under Section 50 of the Act, 1985, and the accused was acquitted.

In Ram Chandra Vs. State of Rajasthan - 2003 (1) Cr.L.R. (Raj.) 455, it was held that an option given to accused to get himself searched in presence of Dy. S.P., who was a member of the raiding party, the same was found to be fatal to the prosecution case and it was held that mandatory provisions of Section 50 have not been complied with and accused was acquitted.

In Azad Singh & Another Versus The State of Rajasthan - 2000 Cr.L.R. (Raj.) 480, this Court considered the facts where notice under Section 50 was alleged to have been given to accused and upon his

search after arrest the same was not recovered from his possession. The specific questions were asked from the accused in respect of notice under Section 50 of the Act but they denied this fact and stated the said notices were never served upon them. In these circumstances this Court drew inference that notices under Section 50 were not served and it was held that the provision of Section 50 was not complied with, which is mandatory in nature and accused was acquitted.

In Munna Ali Versus State - 1999 (1) EFR 287, a Single Bench of Delhi High Court considered the effect of non-recovery of notice from the possession of the accused on his search after arrest and it was held that this fact throws doubt on prosecution version about service of that notice upon the accused and shows that mandatory provisions of Section 50 were not complied with, and accused was acquitted.

In Gurbax Singh Vs. State of Haryana - JT 2001 (2) SC 330, the Hon'ble Supreme Court held that the provisions of Sections 52 and 57 are directory in nature and violation thereof would not ipso facto vitiate the trial. However, I.O. cannot totally ignore

these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article.

In Faglu Ram and Another Vs. State of Rajasthan - 2001 (2) R.C.C. 961, a Single Bench of this Court held that memo of the seal, which was used, was not prepared and the samples sent to the F.S.L., were the same as recovered, sealed and sent, was not established and in the facts and circumstances of that case it was held that the mandatory provisions of the Act have not been complied with and the accused was acquitted.

In Prakash Singh Versus State of Rajasthan - 2001 Cr.L.R. (Raj.) 147, this Court, on appreciation of evidence, found that link evidence in the case is missing and recorded acquittal of the accused-persons.

In Gopal Lal Versus Union of India - 2006 (1) Cr.L.R. (Raj.) 532, this Court considered the fact of not producing the contraband article in the Court and further that seized articles and sealed seal were kept in safe custody therefore it was held that offence is not proved beyond reasonable doubt and conviction of

the accused was set aside.

In K. Mohanan Versus State of Kerala - (2000) 10 SCC 222, their Lordships of the Hon'ble Apex Court, in Para Nos.6 and 7 of the judgment, held as under:-

> "6. If the accused, who was subjected to search was merely asked whether he required to be searched in the presence of a gazetted officer or a Magistrate it cannot be treated as communicating to him that he had a right under law to be searched so. What PW 1 has done in this case was to seek the opinion of the accused whether he wanted it or not. If he was told that he had a right under law to have it (sic himself) searched what would have been the answer given by the accused cannot be gauged by us at this distance of time. This is particularly so when the main defence adopted by the appellant at all stages was that Section 50 of the Act was not complied with.
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> 7. We, therefore, hold that there was non-compliance with Section 50 of the Act and consequently the evidence of search spoken to by PW 1 cannot be acted upon in the absence of any other independent evidence to show that the appellant was in possession of the contraband article."

In Chandra Kailash Hanuman Versus The State of Rajasthan - 2004 (2) Cr.L.R. (Raj.) 1049, a Single Bench of this Court held that accused was not informed about his right to be searched in presence of gazetted officer or Magistrate and the same was treated as non-compliance of Section 50 of the Act, and the accused was acquitted.

In Dilip & Another Versus State of M.P., 2006 (8) Supreme 914, the Hon'ble Supreme Court held that it is now well settled that the offence committed under the Act is grave one and the procedural safeguards provided therefor in terms of Sections 41, 42 and 50 of the Act should be complied with.

In Balubhai Nathalal Bharada Versus State of Maharashtra - (2004) 13 SCC 628, their Lordships of the Hon'ble Supreme Court, in Para 4 of the judgment, held as under:-

> "4. On behalf of the appellant, our attention has been drawn to the relevant portions of the judgment of the courts below as well as the statement of the appellant as Accused 1 under Section 313 of the Code of Criminal Procedure and it was emphasized that to the

questions put to the appellant with reference to the various incriminating circumstances against him including the one pertaining to the lawful nature of the search and seizure, the appellant positively asserted that the claim of the prosecution in this regard was false and that, therefore, the burden rested heavily on the prosecution to substantiate the claims to the contra before the conviction of the appellant could be secured under the provisions of the Act on the basis of the search and seizure is effected. Reliance was also placed on the judgment reported in State of Punjab V. Baldev Singh - (1999) 6 SCC 172, rendered by a Constitution Bench of this Court in which the principles of law relating to the need as well as mode of complying with Section 50 of the Act came to be elaborately considered and explicitly laid down. So far as the relevant aspect on the basis of which the challenge to the procedure adopted in this case to the search and seizure is questioned, it is useful to find even from the very judgment that the question as to whether or not the safeguards provided under Section 50 of the Act were observed would have ,however, to be determined by the courts on the basis of the evidence led at the trial and the finding on that issue, one way or the other, would be relevant for recording an

> order of conviction or acquittal. Coming to the facts of this case, we find that cogent and convincing evidence appears to have been placed during trial to substantiate the claim that there had been due and proper intimation furnished to the accused as to the right to have the search conducted before a Magistrate or a gazetted officer and that the accused who is the appellant before this Court as well as the other has expressed his willingness to be searched by the officers present themselves. The vague plea now raised that PW 4 represented that he is a gazetted officer is incorrect and was not the plea or assertion during trial or in the statement given under Section 313 Cr PC. It is only the Police Inspector Sanghai who made such representation and not PW 4. There was an independent panch witness too, for the seizure. In the teeth of this concurrent finding of fact and in the absence of any material to doubt the veracity and truthfulness of the evidence produced before the Court, we are unable to persuade ourselves to find any fault and infirmity in the findings recorded by both the courts below."

In Bhanwar Singh Vs. Union of India - 2006 CRI.L.J. 3585, a Single Bench of this Court considered the effect of non-compliance of Sections 42 and 50 of

the Act and in the facts and circumstances of that case upheld the conviction of the accused.

In State of Punjab Vs. Swaran Singh – (2005) 6 SCC 101, their Lordships of the Hon'ble Apex Court, in Para No.15 of the judgment, held as under:-

> "15. In the instant case, the accused was not in any way prejudiced by not giving him an opportunity to answer specifically regarding the evidence of PW 1 and PW 4. If at all, the evidence of PW 1 and PW 4 was recorded in his presence, he had the opportunity to cross-examine the witnesses but he did not specifically cross-examine these two witnesses in respect of the facts deposed by them. The learned Single Judge seriously erred in holding that the evidence of PW 1 and PW 4 could not have been used against the accused. The acquittal of the accused was improper as the evidence in this case clearly established that the accused was in possession of 5 kg of opium and thereby committed the offence under Section 18 of the NDPS Act."

I have considered the rival submissions of learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of the trial court and also considered various citations

cited at the Bar, as referred above.

From the facts on the record, as referred above, it is clear that on 25.2.2001 PW-1 Mehtab Singh received a secret information that accused shall carry smack with him and will handover the same to some person and, on that basis, PW-1 Mehtab Singh proceeded for the site along with two independent witnesses and one goldsmith. The accused was caught-hold and contraband i.e. Heroin, weighing 344 grams, was recovered from his possession. The samples were taken from each packet and they were sealed and sent to Forensic Science Laboratory for its chemical examination. The report of the Public Analyst was received in positive. After completion of investigation, a challan was filed against the accused.

So far as applicability of Section 50 of the Act in the present case is concerned, there is no dispute that on search of the accused the contraband was recovered from his right and left pants-pockets. The Hon'ble Supreme Court in State of Himachal Pradesh Vs. Pawan Kumar (Supra), held that the most

appropriate meaning of the word "person" appears to be "the body of human being as presented to public view usually with its appropriate coverings and clothing". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of other without appropriate coverings and clothings. Therefore, the contraband recovered from the clothings of the accused was covered within the meaning of the word "person" in the context of Section 50 of the Act and it is held that it was a personal search and the provisions of Section 50 of the Act were attracted in the present case.

So far as law laid down in the cases of Babulal Vs. Union of India (Supra) and Nadeem Vs. State of Rajasthan (Supra), that taking a Gazetted Officer along with the raiding party makes such person impliedly interested in raid or when a Gazetted Officer is with the raiding party then his evidence becomes doubtful, is concerned, the same cannot be said to be a good law in view of the decision of the Hon'ble Supreme Court in the case of State of Rajasthan Vs. Ram Chandra - (2005) 5 SCC 151, wherein their Lordships held as under:-

> "18. ......The foundation of the stand taken by the accused-respondent which found favour with the High Court is that if he is a member of the raiding party the requirements of Section 50 are not met. This is not legally tenable, ..."

So far as the law laid down in the cases of Anil Vs. Union of India, Shyam Lal Versus State of Rajasthan and Ram Chandra Versus State of Rajasthan (supra), are concerned, it is suffice to refer the judgment of the Hon'ble Apex Court in the State of Rajasthan Vs. Ram Chandra (Supra) wherein it was held that there is no specific form prescribed or intended for conveying the information required to be given under Section 50. What is necessary is that the accused (suspect) should be made aware of the existence of his right to be searched in presence of one of the officers named in the Section itself. Since no specific mode or manner is prescribed or intended, the Court has to see the substance and not the form of intimation. Whether the requirements of Section 50 have been met, is a question which is to be decided on the facts of a particular case and there cannot be any sweeping generalization and/or strait-jacket formula.

So far as another contention of the learned counsel for the appellant, that the alleged notice under Section 50 of the Act, which was served on the accused but not recovered from his possession at the time of his search after his arrest, as there is no reference of it in the seizure-memo as well as arrest-memo, is concerned, the notice (Exhibit P-3) itself shows that accused has given his consent to be searched himself in presence of the Additional Superintendent of Police PW-1 Mehtab Singh and this shows that the notice under Section 50 of the Act was given to him. It is further relevant to mention here that such objection was never taken by the accused during trial and this fact was even not stated by the accused in his statement recorded under Section 313, Cr.P.C.

The last contention of learned counsel for appellant about violation of provision of Section 50 is that PW-1 Mehtab Singh acted in dual capacity, first as an authorized officer under section 42 and secondly as a Gazetted Officer under section 50 as search of accused was made in his presence itself, therefore requirement of Section 50 was not met in view of Para 21 of the judgment in State of Rajasthan

Vs. Ram Chandra (Supra) and as such the conviction of the accused cannot be maintained.

So far as the facts of the present case are concerned, there is no dispute that PW-1 Mehtab Singh received the information and he was holding the post of Additional Superintendent of Police, which is a Gazetted post, and he gave a notice (Exhibit P-3) to the accused under Section 50 of the Act, wherein he mentioned that accused may get himself searched either before a Magistrate or a gazetted officer or before himself, who is also a gazetted officer. The accused gave his consent on the notice (Exhibit P-3) itself that he has no objection in case search is made by PW-1 - the Additional Superintendent of Police, itself.

I have considered the above submission in the light of judgment of the Hon'ble Apex Court in State of Rajasthan Vs. Ram Chandra (Supra) and I find that the facts noticed by Hon'ble Apex Court in Ram Chandra's case (supra) were that on 8.9.1995 Prem Shanker Meena (PW-2), SHO Police Station, Kotwali, Baran, having received information about illicit trafficking in narcotic substances, rushed to the place pointed out by the informant and apprehended the

accused respondent. Satyendra Singh, Dy. S.P. (PW-3) also reached there. Subsequently, being of the suspicion that accused respondent was in possession of contraband, the SHO informed him of his right to have his search conducted either in presence of Shri Satyendra Singh, Dy. S.P. (PW-3), who was a Gazetted Officer and happened to be present there or in the presence of any magistrate. The accused consented for his search to be conducted in the presence of the Dy. S.P. (PW-3). On being searched, 570 grams of opium was recovered from his possession in the presence of Ramesh Chand (PW-5) and Rajendra Kumar (PW-6). The Sessions Judge held that the accused was guilty and convicted him in terms of Sections 8 and 18 of the Act. In appeal, the main stand of the accused-respondent was that there was non-compliance with the requirements of Sections 42 and 50 of the Act. The High Court held that since the accused was searched on a public road and the contraband articles were seized, Section 42 of the Act had no application in view of Explanation appended to Section 43 of the Act. It was noted that Prem Shanker (PW-2), who was an authorized officer under Section 42 of the Act informed the accused of his right to be searched in the presence of the Deputy Superintendent of Police (PW-3) who

happened to be a Gazetted Officer and was present at the site and if he desired, he can be taken to any Magistrate. The accused consented for his search in the presence of the Deputy Superintendent of Police and accordingly search was conducted in the presence of PW-3, the Deputy Superintendent of Police which was witnessed by other witnesses, Ramesh Chandra (PW-5) and Rajendra Kumar (PW-6), but it was held that the consent given by the accused to be searched in the presence of the Deputy Superintendent of Police (PW-3), who was a member of raiding party, was not sufficient compliance of Section 50 of the Act. The order of the High Court was challenged before the Apex Court. The Hon'ble Apex Court, in Para 18 of the judgment, held that "the foundation of the stand taken by the accused-respondent which found favour with the High Court is that if he is a member of the raiding party the requirements of Section 50 are not met. This is not legally tenable"; meaning thereby that even if the Deputy Superintendent of Police was a member of raiding party and search was made before him then it was treated as sufficient compliance of Section 50 of the Act, and in the facts and circumstances of that case, it was further held that PW-3, the Deputy Superintendent of Police, reached the

spot after the person was detained. The Hon'ble Apex Court further held that all the options were made known to the accused and he himself opted to be searched in the presence of Deputy Superintendent of Police (PW-3). It was further held that the conclusion of the High Court would have been correct if the officer, proposing to effect the search, is a Gazetted Officer and he gives option, to be given under Section 50, to the person detained, to be searched in his presence. In that event, the requirement of Section 50 would not be met because the officer proposing to effect the search cannot act in dual capacity; first as an officer authorized under Section 42 to search a person and secondly as a Gazetted Officer in whose presence the accused may opt to be searched. In the instant case a notice under Section 50 (Exhibit P-3) was given by PW-1 Mehtab Singh to the accused wherein it was specifically mentioned that accused may get himself searched either before a Magistrate or a Gazetted Officer or before him, who also happened to be a Gazetted Officer. Therefore, all the options were given to the accused by PW-1 Mehtab Singh and it is not a case that PW-1 Mehtab Singh gave only one option that he himself is a gazetted officer and search will be effected in his presence or by him. If

a notice would have been given by PW-1 mentioning therein about one option only that he himself is the Additional Superintendent of Police and is a Gazetted Officer and accused may get himself searched in his presence then it would not have been a sufficient compliance of Section 50 of the Act because it was necessary to give other options to the accused to get himself searched before the Magistrate or any other Gazetted Officer also but in the present case PW-1 gave all options to the accused and it was accused who exercised one option to get himself searched in presence of PW-1 Mehtab Singh. It was open for the accused to exercise another option to get himself searched either before Magistrate or another Gazetted Officer. It is not the case of accused during trial that he was compelled by PW-1 to exercise only one option to get himself searched before PW-1 only. The accused has also not stated anything about it in his statement recorded under Section 313, Cr.P.C., also. It was for the accused to prove prejudice or bias, if any, on the part of PW-1 Mehtab Singh on the ground that he acted in dual capacity, one under Section 42 and another under Section 50 of the Act. There is no cross-examination of the prosecution witnesses or defence evidence to prove prejudice or bias of PW-1

against accused. The Hon'ble Apex Court in State of Rajasthan Vs. Ram Chandra (Supra), in Para 22 of the judgment, has held that such presumption of bias is not legally available. The Apex Court further in Para 24 observed that "in fact in S. Jeevananthan case (2004) 5 SCC 230 this Court did not accept the plea that an officer who was complainant cannot be the investigating officer. The question of prejudice or bias has to be established and not inferred." In the instant case all the options were made known to the accused and he himself opted to be searched in the presence of PW-1, Additional Superintendent of Police, a Gazetted Officer. The accused has failed to prove as to how his case has been prejudiced if recovery of contraband from him was made in presence of PW-1 after opting option by him to make his search in presence of PW-1. The quantity of contraband 'Heroin' recovered in the case is 344 grams, which is much more than the commercial quantity, therefore, it does not appear to be a case of planting also.

In view of above discussion, I do not find any merit in any of the submissions of the learned counsel for the accused-appellant. Consequently, the appeal is dismissed.

(Narendra Kumar Jain) J.

//Jaiman//